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in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-853

SUSAN JILL FORBICETTA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CERTIFICATE

This is to certify that the foregoing Petition for Rehearing is meritorious and is presented in good faith, and not for the purposes of delay. It is further certified that this Petition for Rehearing is restricted to the grounds herein presented.

Respectfully submitted

/s/ Jack Freed

JACK FREED
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in the

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Pursuant to Rule 58, Supreme Court of the United States Revised Rules, effective July 1, 1970, the Petitioner files this Petition for Rehearing and as grounds therefore says:

1. The United States Court of Appeals for the Fifth Circuit did not rule on the question of the government reneging on the written pretrial stipulation agreement.

2. That intervening circumstances, subsequent to filing the Petition for Writ of Certiorari, make the validity of the agreement uncontrovertible and the reneging of the agreement, by the government, equally uncontrovertible.

3. That due to the foregoing (1 & 2) an untenable situation now exists, which inhibits the orderly administration of the law and must not be permitted to stand.

STATEMENT OF FACTS

Prior to trial the government and defense entered into a written agreement whereby the defendant would waive the constitutional right to a jury trial; adopt the testimony from the Motion to Suppress hearing, so that the government witnesses would not have to come back to testify; and agreed to the introduction of the evidence so that the government would not have the expense of bringing the chemists from Savannah, Georgia to testify. The government agreed that if the defendant was convicted, the government would recommend a maximum of two years and a $2,500.00 surety bond, pending appeal. *The defendant completely honored the agreement,* in that, at trial as agreed the defense waived the constitutional right to a jury trial; the testimony from the Motion to Suppress hearing was adopted; the contraband was admitted; and the testimony of the chemist was waived. The Defendant was convicted. *The government completely dishonored the*

agreement. At the time of sentencing, a different prosecutor appeared, and did not recommend a maximum of two years and did not recommend the $2,500.00 surety bond pending appeal. Although the defense advised the new prosecutor of the agreement, the new prosecutor remained silent while sentence was imposed and the surety bond set. (The government, Solicitor General Office, has now admitted to defense counsel, the validity of the agreement; that the agreement was not kept by the government; and that an erroneous statement was made in the trial court.)

Not only did the new prosecutor breach the written agreement, by remaining silent during sentencing, but also attempted to disavow the agreement, by making an untrue statement to the Court, when defense counsel attempted to proffer the written agreement to the Court.

During the attempted, but unsuccessful, proffer, the Court, for no reason whatsoever, called defense counsel a liar; said he was unfit to practice law; held him in contempt; fined him $100.00; and he was removed from the courtroom by the U.S. Marshal and put in jail.

Although the breach of agreement and the case of *Santobello v. New York*, 404 U.S. 257, was presented to the Court of Appeals for the Fifth Circuit, the Court of Appeals did not rule on this breach. Oral argument had been requested in writing but denied. Rehearing was denied in the Fifth Circuit.

On Petition for Writ of Certiorari, the issue was again raised and was not ruled upon.

The Solicitor General's Office after having investigated and found the validity of the agreement and its breach by the government uncontrovertible, saw fit to lodge a copy of the agreement with the clerk of the United States Supreme Court and admitted, in their brief in opposition, that an erroneous statement was made in the trial court.

The intervening circumstances, to wit: the agreement and the erroneous statement, now admitted, were not ruled upon by the Fifth Circuit because they were not a part of the record at that time.

Certiorari was denied. This Petition for Rehearing due to intervening circumstances and the lack of ruling of the foregoing ensued.

DISCUSSION

This case falls squarely within the principles laid down in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 59 S.Ct. 8, 83 L.Ed 34, wherein the Supreme Court stated:

> "As the Circuit Court of Appeals did not pass upon other questions in the case, the causes will be reversed and remanded to it for further proceeding in conformity with this opinion. . . ."

In the instant case, as with *Schriber-Schroth Co.*, supra we find the identical situation, in that, the Fifth Circuit Court of Appeals did not rule on the government's

breach of the written pre-trial agreement which was presented together with the applicable law as laid down by the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257.

Furthermore, new evidence was introduced at the Supreme Court level. The Solicitor General lodged the written pretrial stipulation agreement with the Clerk of the United States Supreme Court, as referred to in the Brief in Opposition filed by the government and the government also admitted in their brief that an erroneous statement was made, by the prosecutor, in the trial court. This statement in their brief and the introduction of the agreement with the clerk is certainly intervening circumstances.

These intervening circumstances were not a part of the record before and were also not ruled upon by the Fifth Circuit Court of Appeals.

This defendant has been denied her day in court, in that, the trial court would not permit the introduction of the written agreement and that the United States Circuit Court of Appeals for the Fifth Circuit did not pass on the issue presented. Futhermore should this be permitted to stand unattended to, pretrial agreements between prosecution and defense may well be reduced to a mere nullity, for no prosecutor can be held to his agreement.

The United States Supreme Court in a landmark decision, supposedly put the question of prosecutors breach of agreements to rest once and for all. In *Santobello v. New York*, 404 U.S. 257 (1971), a case essentially on all

fours with the instant case, a different prosecutor appeared at sentencing and failed to honor the agreement. Chief Justice Burger, at page 262, stated:

> "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' or has done."

At page 266, the Court in citing other cases, said:

> "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of involuntariness, . . . *As one author has stated, the basis for outright vacation is 'an outraged sense of fairness when a prosecutor breaches his promise in connection with sentencing'.*" (Emphasis added)

At page 267, the Court went on to say,

> "Where the 'plea bargain' is not kept by the prosecutor, *the sentence must be vacated . . .*" (Emphasis added)

CONCLUSION

1. The validity of the pre-trial written agreement is uncontrovertible as a copy has now been lodged with the clerk of this court by the Solicitor General.

2. The breach, by the government is uncontrovertible, as the breach is now admitted by government. (Solicitor General)

3. The issue raised here has never been ruled upon by the Circuit Court of Appeals, for the Fifth Circuit. Their opinion gives it no mention whatsoever.

4. It's also a matter of record that new evidence, that has not been been ruled upon, was introduced at the Supreme Court level. The Solicitor General lodged a copy of the pretrial stipulation agreement with the Clerk of this Court, and also made an admission that an erroneous statement was made in the trial court.

5. The foregoing are not only uncontrovertible but are also now admitted by the government.

It is therefore respectfully submitted that should this issue be permitted to remain in its present state of flux and not be ruled upon, it will create, at best, ambiguous reliance of prosecutor pretrial agreements and gross untenability in the orderly administration of the law, not to mention the overburden placed upon our already over crowded court calendars.

There must have been an *oversight*, because to allow this to stand is against *all* fairness and the law on these issues.

It is further respectfully submitted that this court should grant certiorari or remand this cause to the Circuit Court of Appeals for the Fifth Circuit for further pro-

ceedings consistent with the law as laid down by *Santobello*, or in the alternative, reverse and remand this cause for trial before a different trial judge.

Respectfully submitted,

/s/ Jack Freed

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CERTIFICATE OF SERVICE

I, JACK FREED, attorney for Petitioner, hereby certify that I have this 31st day of May 1974, served by Air Mail three printed copies of the foregoing Petition for Rehearing to the United States Court of Appeals for the Fifth Circuit; three printed copies to the Solicitor General, Department of Justice, Washington, D.C. 20530 and three printed copies, by regular mail to Robert Rust, United States Attorney for the Southern District of Florida, at 14 N.E. 1st Avenue, Suite 300 Ainsley Building, Miami, Florida 33132.

/s/ Jack Freed

JACK FREED